Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CCB Pol 97-4
Petition of MCI for	)	CC Docket 96-98
Declaratory Ruling	)	

INITIAL COMMENTS OF AMERITECH

The Ameritech Operating Companies[1] ("Ameritech") respectfully offer the following comments on MCI's Petition for Declaratory Ruling ("Petition") which was put out on Public Notice on March 14, 1997 ("Public Notice").

In its Petition, MCI asks the Commission to declare:

> that any requirement imposed by an ILEC or a state or local government that a new entrant obtain separate license or right-to-use agreements before they can purchase unbundled network elements violates Sections 251 and 253 of the Act, and that the Act's nondiscrimination requirement requires ILECs to provide the same rights to use intellectual property to new entrants as the incumbent LECs themselves enjoy.

[1] The Ameritech Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. Each AOC is an incumbent local exchange carrier ("ILEC") as that term is defined in 47 U.S.C. Section 252(h)(1).

MCI Petition at 1-2;[2] *see also* Public Notice at 1. More specifically, MCI:

> requests that the Commission issue a declaratory ruling that [ILECs] cannot refuse to provide 'just, reasonable and nondiscriminatory access' to unbundled network elements under the guise of protecting the intellectual property rights of third parties.

MCI Petition at 1 (emphasis added). According to MCI, a declaration of this type is necessary because:

> at least one ILEC is attempting to thwart local entry in multiple states by refusing to allow access to unbundled network elements, as required by the Act, unless competing local exchange carriers (CLECs) first obtain licenses from each and every outside vendor who the ILEC claims may have intellectual property embedded in that element.

Id. Thus, MCI's Petition requests a Commission declaration, not with respect to the intellectual property rights of ILECs, but with respect to the intellectual property rights of third party vendors which license their intellectual property rights to the ILEC. In particular, MCI asks the Commission to "hold that, as a general matter,[3] intellectual property rights of third parties are not implicated in the sale of unbundled network

[2] MCI asks for only the first part of this relief in the conclusion to its Petition.

[3] It is not at all clear how the Commission could provide MCI its requested relief "as a general matter" given the fact-specific nature of intellectual property rights, the enforcement of those property rights and how those rights conceivably might be affected by the provision of a particular unbundled network element.

elements"[4] ("UNEs") because "the purchase of access to elements does not equate to the purchase of control over those elements."[5]

There are four substantive reasons why the Commission should deny MCI's Petition.[6]

First, an ILEC cannot be ordered by Commission declaration to convey intellectual property rights of third parties to a CLEC. If an ILEC has any such rights itself, they are the rights of a licensee which the ILEC obtained through a contract with the owner of the intellectual property, and licensees cannot lawfully confer those rights to others without the permission of the property owner.[7] Thus, MCI's Petition is directed at the wrong party.

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[4] MCI Petition at 7.

[5] *Id.* at 6. CLECs are entitled under the Commission's rules to the "exclusive use" of a UNE. 47 U.S.C. Section 51.309(c).

[6] Apart from the substantive problems with MCI's Petition, the procedural context of MCI's Petition is confusing. The Public Notice acknowledges that the issues raised by MCI currently are pending before the Commission on Reconsideration of the *First Report and Order* in CC Docket No. 96-98 and, therefore, the Commission asks that comments on MCI's Petition also should be filed in Docket No. 96-98 the way they would have been had the Commission asked for an additional round of comments in that docket. This issue also is pending in the appeal of the *First Report and Order*. *See* Brief for Petitioners Regional Bell Companies and GTE at 62-64, *Iowa Utilities Board, et al. v. F.C.C.*, No. 96-3321 (8th Cir. filed Nov. 18, 1996). Moreover, MCI states at page 4 of its Petition that one state already has decided this issue in an interconnection arbitration, a decision that MCI presumably will appeal. But MCI does not ask the Commission to preempt that state decision; it asks only for declaratory relief.

[7] To the extent (a) Ameritech has the legal authority under its license agreement to confer any such right to a carrier requesting a UNE, and (b) if it is necessary to do so in order for

Second, the Commission has no jurisdiction to alter intellectual property rights of third parties. For example, the Commission itself has acknowledged in the past that copyright matters are entirely beyond its jurisdiction. *See e.g.*, Teleprompter Corp. v. CBS, Inc., 415 U.S. 394, 406 & n. 11 (1974)("The FCC has consistently contended that it is without power to alter rights emanating from other sources, including the Copyright Act."). There is no reason why this would not be equally true with respect to patent rights and other forms of intellectual property.

There is nothing in the Telecommunications Act of 1996 that provides the Commission with this authority for purposes of MCI's Petition. Section 251(d)(2) provides, in part, that "[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether -- (A) access to such network elements as are proprietary in nature is necessary ... ." Therefore, depending on the circumstances, the Commission may or may not have authority to order access to network elements which are proprietary to the ILEC. But, nothing in the language of Section 251(d)(2) gives the

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Ameritech to provision a UNE that Ameritech is required by law to provide, Ameritech will confer the right and provide the UNE.

Commission authority to order access to network elements if that will alter intellectual property rights of third parties.

Third, even if the Commission did have jurisdiction to alter intellectual property rights of third parties, doing so would be illegal in this docket because it would amount to a taking of the third party's property rights without due process or just compensation. There is a lack of due process because the third parties have not been given adequate notice that the Commission may alter their intellectual property rights in this case,[8] and it is doubtful that the Commission has the authority to effectuate such a taking in any event.[9] Moreover, these third parties may be entitled to compensation for any such taking. However, the MCI Petition does not address the issue of compensation and it is not clear that the Commission has the jurisdiction to award compensation for a taking, especially since the Commission does not exercise jurisdiction over these third parties.

[8] It is doubtful that the Public Notice of MCI's Petition would be regarded as sufficient notice to third parties that their intellectual property rights might be altered in this docket.

[9] *See Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441 (D.C. Cir. 1994)("the [Communications] Act does not expressly authorize an order of physical co-location, and thus the Commission may not impose it."). In its Petition in this case, MCI effectively asks the Commission to effectuate a taking for the benefit of MCI as a private party.

Fourth, MCI's alternative position -- that if third party property rights are implicated by the sale of UNEs then the ILEC must secure those rights on behalf, and for the benefit, of the CLEC requesting those UNEs -- is not required by either the "just, reasonable, and nondiscriminatory" standard in Section 251(c)(3) of the Act or sound public policy, as MCI asserts. While it may be reasonable to require an ILEC to cooperate in good faith with a CLEC's effort to acquire the intellectual property rights necessary for the provisioning of a particular UNE, an ILEC cannot be regarded as having violated the "just, reasonable, and nondiscriminatory" standard in Section 251(c)(3) simply because it has no legal authority to unilaterally extend its rights as a licensee of intellectual property to a requesting CLEC. The public interest is not promoted by a Commission-imposed requirement -- however well intentioned -- that the ILEC has no legal or practical means with which to comply. For instance, how could an ILEC negotiate with an equipment vendor on behalf of a CLEC competitor when any price that is negotiated would be immediately suspect?

In sum: Ameritech agrees that an ILEC should not be allowed to avoid its obligation to provide a UNE "under the guise of protecting the intellectual property rights of third parties."[10] However, where intellectual

[10] MCI Petition at 1. (emphasis added)

property rights of third parties do exist and cannot be conveyed by the ILEC, those rights cannot be simply ignored under the guise of enforcing Sections 251 or 253 of the Telecommunications Act of 1996.

For these reasons, the Commission should deny MCI's Petition.

Respectfully submitted,

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Dated: April 15, 1997

CERTIFICATE OF SERVICE

I, Edith Smith, do hereby certify that a copy of Ameritech's Initial Comments in CCB Pol 97-4 and CC Docket 96-98 has been served on Janice Myles, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, DC 20554 and the parties in CC Docket No. 96-98, via first class mail, postage prepaid, on this 15th day of April, 1997.

By: _____
Edith Smith